

THE
English-mans
RIGHT.
A
DIALOGUE
BETWEEN
A *BARRISTER* at *LAW*,
AND A
JURY-MAN:

Plainly setting forth,

- | | |
|--------------------------------------|--------------|
| I. The Antiquity | } of JURIES, |
| II. The excellent designed use | |
| III. The Office and just Priviledges | |

By the Law of England.

L O N D O N: Printed for Richard Janeway, in Queens-
head Alley in Paternoster-Row. 1680.

THE
English-mans
RIGHT.
DIALOGUE
A BARRISTER at LAW,
JURY-MAN.



The Author
The Excellence designed etc
of Juries
The Office and full Privileges

By the Law of England.

LONDON: Printed for Richard Juxon, in Queen-
Street, at the Sign of the Crown, 1785.

The Englishmans RIGHT, &c.

My old Client! a good morning to you, whether so fast? *The Inroads.*
 you seem intent upon some important affair? *Blue.*

Juryman. Worthy Sir! I am glad to see you thus *ap-
 pointedly*, there being scarce any person that I could at this time
 rather have wish'd to meet with.

Barr. I shall esteem my self happy, if in any thing I can
 serve you. — The *business* I pray?

Jury. I am summon'd to appear upon a *Jury*, and was just
 going to try if I could get off. Now I doubt not but you can
 put me into the best way to obtain that favour.

Barr. 'Tis probable I could: But first let me know the
reasons why you desire to *decline that service*.

Jury. You know, Sir, there is something of *trouble* and *The Reasons*
loss of time in it; and more *Loss, Liberties, and Disfranchisement* why fit men
 (which depend upon a Jury's *Guilty, or Not guilty*, for the endeavour
 Plaintiff, or for the Defendant) are *weighty things* I would sometimes to
 not wrong my Conscience for a world, nor be necessary to avoid serving
 any mans ruin. There are others *better skil'd* in such matters. on Juries.
 I have ever so loved *peace*, that I have forborn going to *Law*,
 (as you well know many times) though it hath been much
 to my loss.

Barr. I commend your *tendernefs* and *modesty*; yet must *Not sufficient.*
 tell you, these are but general and *weak* excuses. As for your
 time and trouble, 'tis not *much*; and however, can it be bet-
 ter spent than in doing *justice*, and serving your Country?
 To withdraw your self in such cases, is a kind of *sacriledg*, &
 robbing of the publick of those duties which you justly owe
 it: the more *peaceable* than you have been, the more fit you
 are. For the office of a *Jury-man* is, *conscientiously* to judge his
neighbour; and needs no more *Law* than is easily learnt to di-
 rect him therein. I look upon you therefore as a man well-
 A 2
 qualified

qualified with *estate, discretion, and integrity*; and if all such as you, should use private means to avoid it, how would the King and Country be honestly served? At that rate we should have none but *Fools or Knaves* intrusted in this grand concern, on which (as you well observe) the Lives, Liberties, and Estates of all *Englishmen* depend.

Your *Tenderness* not to be necessary to any mans being wrong'd or ruin'd, is (as I said) much to be commended. But may you not incur it unawares, by seeking thus to avoid it? *Pilate* was not innocent because he wash'd his hands, and said, *He would have nothing to do with the blood of that just one.* There are faults of *Omission* as well as *Commission*. When you are legally call'd to try such a cause, if you shall shuffle out your self, and thereby persons perhaps less conscientious happen to be made use of, and so a *Villain* escapes Justice, or an innocent man is ruined by a prepossest or negligent Verdict, can you think your self in such a case wholly blameless? *Qui non prohibet eum potest, jubet: He abets evil, that prevents it not when he may. Nec caret scrupulo societatis occulta qui evidenter facinorosi desuper obviare: He deserves not to be free from the suspicion of a close society, or underhand conspiracy of the mischiefes of subverting the fundamental Laws and Liberties of the Nation, who causes to obviare and oppose it.*

Jurym. Truly I think a man is bound to do all the good he can, especially when he is lawfully call'd to it. But there sometimes happen nice cases, wherein it may be difficult to discharge ones conscience without incurring the displeasure of the Court, and thence trouble and damage may arise.

Barr. That is but a vain and needless fear. For as the *Jurors privileges* (and every *English-mans* in and by them) are very considerable; So the Laws have no less providently guarded them against Invasion or Usurpation. So that there needs no more than first understanding to know your duty, and in the next place courage and resolution to practise it with impartiality and integrity, free from accursed bribery and malice, or (what is full out as bad in the end) base and servile fear.

Jur.

Juryman. I am satisfied, that as 'tis for the advantage and honour of the publick, that men of *understanding, substance, and honesty* should be employ'd to serve on Juries, that *justice and right* may fairly be administred; So 'tis *their own* interest when called thereunto, readily to bestow their attendance and service, to prevent *ill presidents* from men otherwise qualified; which may by degrees *fatally*, though insensibly, undermine our just Birth-rights, and perhaps *fall be* upon us, or our posterity. But for my own part, I am fearful lest I should suffer through my *ignorance* of the duty and office of a Juryman, and therefore on that account principally it is, that I desire to be excused, in my appearance, which if I understood but so well as I hope many others do, I would with all my heart attend the service.

Barr. You speak honestly; and like an *Englishman*. But if that be all your cause of scruple, it may soon be removed; if you will but give your self a very little trouble of inquiry into the necessary provisions of the Law of *England* relating to this matter.

7. There is nothing (of a *temporal* concern), that I would more gladly be inform'd in, because I am satisfied, 'tis very *expedient* to be generally known. And first I would learn how long trials by Juries have been used in this Nation. The Antiquity of Trials by Juries.

B. Even time out of mind; so long, that our best *Historians* cannot date the Original of the Institution, being indeed *contemporary* with the Nation it self, or in use as soon as the people were reduced to any form of *Civil Government*, and administration of Justice. Nor have the several Conquests or Revolutions, the mixtures of *Foreigners*, or the mutual sends of the *Natives*, at any time been able to suppress or overthrow it. For,

1. That Juries (the *thing* in effect and *substance*, though perhaps not just the number of *Twelve men*) were, in use amongst the *Britains*, the first Inhabitants of this Island, appears by the Ancient Monuments and Writings of that Nation, attesting that their *Free holders* had always a *share* in all Tryals and determinations of differences. Amongst the Britains.

2. Most certain it is, that they were practised by the *Saxons*, ons,

Amongst the
Saxons.
Lamb. p. 218.
Coek 1. par. In-
stitutes. fol.
155.

ons, and were then the *only Courts*, or at least an essential, and the greater part of all Courts of Judicature: For so (to omit a multitude of other Instances) we find in King *Ethelreds* Laws, *In singulis Centuriis, &c.* In every Hundred let there be a Court, and let Twelve ancient Free-men, together with the Lord, or rather according to the Saxon, the Greve, i. e. the chief Officer amongst them, be sworn, that they will not condemn any person that is Innocent, nor acquit any one that is guilty.

Continued by
the Normans.
See Spelman's
Glossar. in
the word
Jurata.

3. When the Normans came in, *William*, though commonly called the Conqueror, was so far from abrogating this Priviledg of Juries, That in the 4th year of his Reign, he confirmed all King *Edward the Confessors* Laws, and the ancient Customs of the Kingdom (whereof this was an essential and most material part). Nay, he made use of a Jury chosen in every County, to report and certifie on their Oaths what those Laws and Customs were; as appears in the Proem of such *Jury Confirmation*.

Confirmed by
Magna Charta.

4. Afterwards when the Great Charter, commonly called *Magna Charta*, (which is nothing else than a recital, confirmation and corroboration of our Ancient English Liberties) was made and put under the Great Seal of England in the 9th year of King *Henry the 3d* (which was *Anno Domini 1215*.) Then was this Priviledg of Tryals by Juries in an especial manner confirmed and established, as in the 14th Chapter, That no *Amercements* shall be assessed, but by the Oath of good and honest men of the Vicinage. And more fully in that Golden Nine and twentieth Chapter—No Freeman shall be taken, or imprisoned, nor be disseized of his Freehold or Liberties, or free customs, or be out-law'd, or exil'd, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful judgment of his Peers, &c. Which Grand Charter having been confirmed by above thirty Acts of Parliament, the said right of Juries thereby, and by constant usage, and common custom of England, which is the common Law, is brought down to us as our undoubted Birth-right, and the best inheritance of every English man. For as that famous Lawyer Chief

Justice

Justice Cook in the words of Cicero, excellently avers, *Major* ^{2. Institutes, fol. 56.}
Hereditas venit unicuique nostrum a jure & legibus quam a parentibus: 'Tis a greater inheritance, and more to be valued, which we derive from the fundamental constitution and Laws of our Country, than that which comes to us from our respective Parents. For without the former, we have no claim to the latter.

7. But has this method of Trial never been attempted to be invaded or jostled out of practice?

8. 'Tis but rarely that any have arrived to so great a confidence: For 'tis a most dangerous thing to shake or alter any of the rules or fundamental points of the common Law, which in truth are the main pillars and supporters of the fabrick of the Commonwealth. These are Judge Cook's words*. Yet sometimes it has been endeavoured. But so sacred and valuable was the Institution in the eyes of our Ancestors, and so tenacious were they of their Privileges, and zealous to maintain and preserve such a vital part of their Birth-right and Freedom, that no such attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash undertakers. For example,

1. Andrew Horn an eminent Lawyer, in his Book Entituled, *The Attirour of Justices*, (written in the Reign of K. Edm. 1. now near 400 years ago) in the fifth Chapter, and first Section, records, That the renowned Saxon King Alfred caused four and forty Justices to be bang'd in one year as murderers, for their false Judgments. And there recites their particular Crimes, most of them being in one kind or other Infringements, Violations and Encroachments of and upon the Rights and Privileges of Juries; amongst the rest, that worthy Author tells us, he bang'd one Justice Cadwine, because he judg'd one Hackwy to death without the consent of all the Jurors; for whereas he stood upon his Jury of twelve men, because three of them would have saved him, this Cadwine removed those three, and put others in their room, on the Jury, against the said Hackwy's consent. Where we may observe, that though at last twelve men did give a Verdict against him, yet those 60 put

Essays made to overthrow Trials by Juries, always unsuccessful, and severely punisht.

* 2. Institutes, pag. 74.

put upon him, were not accounted *his Jurors*; by reason all, or any of them, who were first sworn to try him, could not (by Law) be removed, and others put in their stead. And that such illegal alteration was then adjudged a *Capital Crime*, and forthwith the said *Cadwine* was Hang'd.

Cook 2^d part
of Institutes,
fol. 51.

2. A second instance I shall give you in the words of the Lord Chief Justice Cook. "Against this ancient and fundamental Law (and in the face thereof) there was in the 11. year of King Henry 7. cap. 3. an Act of Parliament obtained (on fair pretences, and a *specious* preamble, as to avoid divers mischiefs, &c.) whereby it was Ordain'd, That from thenceforth, as well Justices of Assize, as Justices of the Peace, upon a bare Information for the King before them made, without any finding or presentment by the Verdict of Twelve men, should have full power and authority by their discretions, to hear and determine all offences and contempts committed or done by any person or persons against the Form, Ordinance, or effect of any statute made and not repealed, &c." "By colour of which Act (saith Cook) breaking this Fundamental Law (by means, touching all Trials to be by Juries) it is not credible what HORRIBLE OPPRESSIONS and EXACTIONS, to the undoing of MULTITUDES of people, were committed by Sir Richard Empson Knight, and Edmund Dudley Esq; (being Justices of the Peace) throughout England; and upon this unjust and injurious Act (as commonly in like cases it falleth out) a new Office was erected, and they made Masters of the Kings Forfeitures.

But not only this Statute was justly soon after the decess of Hen. 7. repealed by the Statute of the 1 Hen. 8. cap. 6. but also the said Empson and Dudley (notwithstanding they had such an Act to back them, yet it being against *Magna Charta*, and consequently void) were fairly executed for their pains; and several of their under agents, as *Promoters*, *Informers*, and the like, severely punished, for a warning to all others that shall dare (on any pretence whatsoever) infringe our English Liberties. For so the Lord Cook having (elsewhere) with de-

See Sir Rich.
Bakers Chron.
p. 273.
4. part Instit.
fol. 41.

detestation mentioned their story, pathetically concludes, *Quorum vestigia insistant, exitus perhorrescant*; Let all those who shall presume to tread their steps, tremble at their dreadful end. Other Instances of a latter date might be given, but I suppose these may suffice.

J. Yes surely; and by what you have discoursed of the long continued use of *Juries*, and the zealous regards our Ancestors had, not to part with them; I perceive that they were esteemed a *special priviledg*. Be pleased therefore to acquaint me wherein the *excellency* and *advantages* to the people by that method of trial above others, may consist?

B. This question shews you have not been much conversant abroad, to observe the *miserable* condition of the poor people in most *other Nations*, where they are either *wholly* *sub-* *ject* to the *despotic* *arbitrary* lusts of their Rulers; or at best under such Laws as render their Lives, Liberties, and Estates, liable to be disposed of at the *discretion* of strangers appointed their Judges, most times *mercenary*, and Creatures of *Prerogative*; sometimes *malicious* and oppressive, and often *partial* and corrupt. Or suppose them never so *just* and *upright*, yet still has the Subject no security against the attacks of *unconscionable Witnesses*; yea, when there is *no sufficient Evidence*, upon bare suspicions they are obnoxious to the *Tortures of the Rack*, which often make an *innocent* man confess himself *guilty*, merely to get out of present pain. Is it not then an *inestimable happiness* to be born and live under such a *mild* and righteous Constitution wherein *all these mischiefs* (as far as humane prudence can provide) are prevented; where none can be condemn'd, either by the *power* of *superior enemies*, or the *rashness* or *ill will* of any *Judge*, nor by the bold *Affirmations* of any *profligate evidence*; But no less than *Twelve*, *honest*, *substantial*, *impartial men*, his neighbours (who consequently cannot be presumed to be unacquainted either with the matters charged, the Prisoner's course of life, or the credit of the Evidence) must first be *fully satisfied* in their Consciences, that he is *guilty*, and so all unanimously

The benefits of being tried by Juries.

See all this excellently made out, and more at large by the L. C. J. Fortescue, afterwards Chancellor to K. Hen. 6. in his Book, De laudibus Legum Anglie. c. p. 16, 17, 18, & 19.

pronounce him upon their *Oaths*. Are not these, think you very *material priviledges*?

3. Yes certainly, though I never so well consider'd them before. But now I plainly see our forefathers had, and we still have *all the reason in the world* to be zealous for the maintenance and preservation thereof from subversion or encroachments, and to transmit them *intire* to posterity. For if once this *bank* be broken down or neglected, an *ocean* of oppression, and the ruins of infinite numbers of people, (as in *Rampson* and *Dudley's* days) may easily follow, when on any pretence they may be made *Criminals*, and then fined in vast sums, with pretext to enrich the Kings Coffers, but indeed to feed those insatiate *Vultures* that promote such unreasonable Prosecutions. But since you have taught me so much of the *antiquity* and *excellency* of Juries, I cannot but crave the continuance of your favour to acquaint me somewhat more particularly of their *office* and *power* by Law.

B. I shall gladly comply with so reasonable and just a request. *A Jury of twelve men are by our Laws the only proper Judges of the matter in issue before them.* As for instance,

1. That Testimony which is delivered to induce a Jury to believe, or not to believe the matter of Fact in issue, is called in Law EVIDENCE, because thereby the Jury may out of many matters of Fact, *Evidere veritatem*, that is, *see clearly the truth*, of which they are proper Judges.

2. When any matter is sworn, Deed read, or offered whether it shall be believed or not, or whether it be *true or false* in point of Fact, the Jurors are proper Judges.

3. Whether such an act was done in such or such a manner, or to such or such an *intent*, the Jurors are Judges. For the Court is not Judge of these matters, which are evidence to prove or disprove the thing in issue. And therefore the Witnesses are always ordered to *direct their speech to the Jury*, they being the proper Judges of their Testimony. And in all Pleas of the Crown (or matters Criminal) the Prisoner is said, *to put himself for trial upon his Country*, which is explain-

showed
in going
about the

side line 2
quasi

The Office
and power
of Juries.

See Case, 4th
part of Instit.
for 34.

20. 2. 1. 2. 3.

ed and referred by the Clerk of the Court, to be meant of the Jury, saying to them, *Which Country you are.*

7. Well then, what is the part of the Kings *Justices*, or the Court? what are they to take cognizance of, or do, in the Trials of mens Lives, Liberties, and Properties?

The office of the Court in Trials.

B. Their office in general is to do *equal justice* and right: particularly,

1. To see that the Jury be regularly *return'd* and duly *sworn*.

2. To see that the Prisoner (in cases where 'tis permittable) be allowed his lawful *challenges*.

3. To advise by Law, whether such matter may be given in evidence or not, such a writing read or not, or such a man admitted to be a witness, &c.

4. Because by their *learning* and experience they are pre-sum'd to be best qualified to ask pertinent questions, and in the most perspicuous manner soonest to sift out truth from amongst tedious impertinent Circumstances and Tautologies; they therefore commonly *examine the Witnesses in the Court*, yet not *excluding the Jury*, who of right *may*, and where they see cause, *ought* to ask them any necessary questions, which undoubtedly they may lawfully do with modesty and discretion, without *begging any leave*. For if asking leave be necessary, it implies in the Court a right when they list to *deny* it; and how then shall the Jury know the truth? And since we see that Council, who too often (*— rudet hac opprobria nobis*) for their fees strive only to baffle Witnesses, and misle Truth, take upon them daily to *interrogate* the evidence, 'tis absurd to think that the Jurors should not have the *same* *priviledg*, who are upon their *Oaths*, and *proper Judges* of the matter.

5. As a discreet and *lawful Assistant* to the Jury, they do often recapitulate and sum up the heads of the Evidence, but the Jurors are still to consider whether it be done *truly, fully and impartially*, (for one mans *minor*) may sooner fail than *twelve's*.) He may likewise state the Law to them, that

Faughan's Reports in Bushell's Case, fol. 144.

is, deliver his *opinion* where the case is difficult, or they *desire* it. But since *Ex falso jus oritur*, all matter of Law arises out of matter of Fact, so that till the Fact is *settled* there is no room for Law; therefore all such *discourses* of a Judge to a Jury are or ought to be *Hypothetical*, not *coercive*; conditional, and not *positive*; viz. *If you find the fact thus or thus*, (still leaving the Jury at liberty to find as they see cause) *then you are to find for the Plaintiff*. But *if you find the Fact thus or thus, then you are to find for the Defendant*, or the like, *Guilty*, or *not guilty*, in cases Criminal.

Lastly, They are to *take the Verdict* of the Jury, and thereupon to give *judgment* according to Law. For the office of a Judge (as Cook well observes) is *jus dicere*, not *jus dare*; not to make any Laws by strains of wit, or forced Interpretations; but plainly and impartially to declare the Law already established. Nor can they refuse to accept the Jury's Verdict when agreed: For if they should, and force the Jury to return, and any of them should miscarry for want of accommodation, it would undoubtedly be murder; and in such case the Jury may without crime force their liberty, because they are illegally confined, having given in their Verdict, and thereby honestly discharged their office, and are not to be starv'd for any mans pleasure.

How Jurors
are Judges of
Law as well
as Fact.

J. But I have been told, That a Jury is only Judge of naked *matter of fact*, and are not at all to take upon them to meddle with, or regard *matter of Law*, but leave it wholly to the Court.

B. 'Tis most true, Jurors are *Judges* of matters of Fact, that is their *proper Province*, their chief business; but yet not excluding the consideration of matter of Law, as it *arises* out of, or is *complicated* with, and *influences* the Fact. For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* position, and contradicted by every days *experience*; but also a very *dangerous* and *pernicious* one, tending to defeat the principal end

end of the Institution of Juries, and so subtilly to *undermine* that which was *too strong* to be *batter'd down*.

1. *It is false*: for though the direction as to matter of Law separately may belong to the Judge, and the finding the matter of Fact does peculiarly belong to the Jury, yet must your Jury also *apply matter of Fact and Law together*; and from their consideration of, and a right judgment upon both, bring forth their Verdict: For do we not see in most General issues, as upon *not guilty*, pleaded in *trespass*, breach of the peace, or *Felony*, though it be matter in Law whether the party be a *trespasser*, a breaker of the Peace, or a *Felon*; yet the Jury do not find the *Fact* of the case by it self, leaving the Law to the Court; but find the party *guilty*, or not *guilty*, generally. So as though they answer not to the question singly, *what is Law*; yet they determine the Law in all matters where Issue is join'd. So likewise is it not every days practise, that when persons are Indicted for *murder*, the Jury does not only find them *guilty* or not *guilty*, but many times upon hearing and weighing of circumstances, brings them in, either *guilty* of *Murder*, *Manslaughter*, *per Infortunium*, or *se-defendendo*, as they see cause. Now do they not herein *complicately resolve* both Law and Fact? And to what end is it that when any person is prosecuted upon any *Statute*, the Statute it self is usually read to the Jurors, but only that they *may judge*, Whether or no the matter be within that Statute? But to put the business out of doubt, we have the *suffrage* of that Oracle of Law *Littleton*, who in his *Tenures*, *sect. 368.* declares, *That if a Jury will take upon them the knowledg of the law upon the matter, they may.* Which is agreed to, likewise by *Cook* in his Comment thereupon. And therefore is *false* to say, That the Jury hath not power, or doth not use frequently to apply the Fact to the Law; and thence taking their *measures*, judge of, and determine the *crime* or *issue* by their Verdict.

2. As Juries have ever been vested with such power by Law, so to exclude them from, or *disfette* them of the same, were utterly to defeat the end of their institution. For then if a person should be Indicted for doing any common innocent act, if it be but clothed and disguised in the Indictment with the name of Treason, or some other high crime, and prov'd by Witnesses to have been done by him; the Jury though satisfied in Conscience, that the Fact is not any such offence as 'tis called, yet because (according to this fond opinion) they have no power to judg of law, and the fact charged is fully prov'd, they should at this rate be bound to find him *guilty*. And being so found, the Judg may pronounce sentence against him, for he finds him a convicted Traytor, &c. by his Peers. And thus as a certain Physician boasted, That he had *kill'd one of his Patients with the best method in the world*; So here should we have an innocent man hang'd, drawn, and quarter'd, and all according to law.

J. God forbid that any such thing should be practised; and indeed I do not very fully understand you.

B. I do not say it ever hath been, and I hope it never will be practised: But this I will say, that according to this Doctrine, it *may be*; and consequently Juries may thereby be rendred rather a snare or engine of oppression, than any advantage or Guardian of our Legal Liberties against Arbitrary Injustice, and made meer properties to do the drudgery, and bear the blame of unreasonable Prosecutions. And since you seem so dull as not to perceive it, let us put an Imaginary case, not in the least to sber any irreverence towards his Majesty, but only to explain the thing, and shew the absurdness of this opinion. Suppose then a man should be Indicted; For that he is a false Traytor not having the fear of God before his eyes, &c. did

did tragically, presumptuously against his Allegiance, and with an intent to affront his Majesty's Person and Government, pass by such or such a Royal Statue or Effigies with his hat on his head, to the great contempt of His Majesty and his Authority, the evil example of others, against the Peace, and his Majesty's Crown and Dignity. Being hereupon arraigned, and having pleaded Not guilty, suppose that sufficient evidence should swear the matter of Fact said in the Indictment, viz. That he did pass by the Statue or Picture with his hat on; now imagine your self one of the Jury that were sworn to try him, What would you do in the matter?

J. Do? Why I should be satisfied in my Conscience, That the man had not herein committed any crime, and so I would bring him in not Guilty.

B. You speak as any honest man would do: But I hope you have not forgot the point we were upon; Suppose therefore when you thought to do thus, the Court, or one of your Brethren, should take you up and tell you, That it was out of your power so to do: For look ye (saith he) my Masters! we Jurymen are only to find matter of Fact, which being fully proved as in this case before us it is, we must find the party Guilty; whether the thing be Treason or not, does not belong to us to inquire; 'tis said so here, you see in the Indictment, and let the Court look to that, they know best, we are not Judges of Law: Shall we meddle with niceties and punctilio's, and go contrary to the directions of the Court? Or perhaps we shall bring ourselves into a premunire (as they say) and perhaps never be suffered to be Jury men again. No, no. The matter of Fact you see is proved, and that's our business: we must go according to our Evidence, we cannot do less; truly 'tis something hard, and I pity the poor man, but we cannot help it, &c. After these notable documents, what would you do now?

An ordinary
Jury-man's
wife Speech.

J. I should not tell what to say to it; for I have heard several *honest* Jury-men speak to the very same effect, and thought they talk'd very wisely.

B. Well then, would you consent to bring in the man *Guilty*?

J. Truly I should be somewhat *unwilling* to do it; but I do not see which way it can be avoided; but that he *must be found guilty of the Fact*.

B. God keep every honest body from such *Jury-men*; have you no more regard to your *Duty*? to your *Conscience*? to *Justice*? to the *Life* of a man?

J. Hold! hold! perhaps we would not bring him in *Guilty* generally; but only *Guilty of the Fact*, Finding no more but *Guilty of passing by the statute with his Hat on*.

B. This but poorly mends the matter, and signifies little or nothing; For such a finding hath generally been *refused* by the Court, as being *repugnant*, though 'tis said it was lately allowed somewhere in a *case that required favour*. But suppose it were accepted, what do you intend shall become of the Prisoner? must not he be kept in Prison till all the Judges are at leisure and willing to meet and *argue* the business? Ought you not, and what Reason can you give why you should not absolutely acquit and discharge him? Nay, I do aver, you are bound by your Oaths to do it, by saying with your mouths to the Court, what your *Consciences* cannot but dictate to your selves, *Not Guilty*: For pray consider, Are you not sworn, *That you will well and truly Try, and true deliverance make*? There's none of this Story of *matter of Fact*, distinguish'd from *Law* in your Oath. But you are, *Well*, that is, *Fully* and *Truly*, that is, *Impartially*,

ially, to try the Prisoner, So that if upon the Consciences, and the best of the *Understanding* by what is proved against him, you find he is guilty of that *Crime* wherewith he stands charged, that is, deserving *Death*, or such *other Punishment* as the Law inflicts upon an Offence so *demonstrated*, then you are to say, he is *Guilty*. But if you are not satisfied, that either the *Act* he has committed was Treason, or other *Crime*, (though it be never so often called so) or that the *Act* it self, if it were so criminal, was not *done*, then what remains but that you are to acquit him? For the end of Juries is to preserve Men from *oppression*, which may happen as well by *imposing* or ruining them for that as a *Crime*, which indeed is *none*, or at least not such or so great as is pretended, as by charging them with the Commission of that which in truth was not committed. And how do you well and truly Try, and true Deliverance make, when indeed you do but deliver him up to others to be *Condemned*, for that which your selves do not believe to be any *Crime*?

Jury. Well; but the *supposed Case* is a *Case unsupposable*. It is not to be imagined, that any such thing should happen, nor to be thought, that the Judges will condemn any Man, though brought in Guilty by the Jury, if the Matter in it self be not so *Criminal* by Law.

Kerr. 'Tis most true, I do not believe that ever that *Case* will happen. I put it in a thing of apparent *Absurdity*, that you might the more clearly observe the unreasonableness of this *Doctrine*; but withal I must tell you, That 'tis not impossible that some *other Cases* may really happen, of the same or the *like nature*, though more *fine* and plausible. And though we apprehend not, that during the Reign of His Majesty that now is, (*whose Life God long preserve*) any Judge will be made that would so *wrest the Law*; Yet what Security is there, but that some *Successors* may not be so cautious in their Choice? And though our *Benches* of Judicature be at present furnish'd with Gentlemen of great Integrity, yet there may one day happen some *Treilian*, or *Kinsman of Empsons*, to get in, (for what has been, may be) who *Empson*-like too, shall pretend it to be for his Masters

Services, to encrease the number of Criminals, that his Coſſets may be fill'd with *Fines* and *Forfeitures*. And then ſuch miſchief may ariſe. And Juries having upon confidence parted with their juſt Priviledges, ſhall then, too late, ſtrive to re-aſſume them, when the number of Ill-pretidents ſhall be vouch'd to enforce that as of *Right*, which in truth was at firſt a *Wrong* grounded on *Eſineſe* and *Ignorance*. Had our wiſe and wary Anceſtors thought fit to depend ſo far upon the *Contingent Humility* of Judges, they needed not to have been ſo zealous to continue the uſage of *Juries*.

Jury. Yet ſtill I have heard, that in every Indictment, or Information, there is always ſomething of *Form* or Law, and ſomething elſe of *Fact*; and it ſeems reaſonable, that the Jury ſhould not be bound up nicely to find every *Formality* therein expreſſed, or elſe to acquit (perhaps) a notorious Criminal. But if they find the *Effential Matter* of the Crime, then they ought to find him *Guilty*.

How far aggravating words, or thoſe of courſe in Indictments or Informations, are to be regarded.

Bar. You ſay *true*, and therefore muſt note, that there is a wide difference to be made between *Words of Courſe*, rais'd by Implication of Law, and *Effential Words*, that either *make*, or really *aggravate* the Crime charged. The Law does ſuppoſe and imply every Treaſon, Breach of the Peace, every Felony, Murder, or Treason to be done *With Arms*, with Force and Arms, &c. Now if a Perſon be Indicted for Murder by *Poiſon*, and the Matter proved, God forbid the Jury ſhould ſcruple the finding him *Guilty* upon the Indictment, merely becauſe they do not find that part of it, as to *Force and Arms*, proved. For that is implied as a neceſſary or allowable *Fiction* of Law.

But on the other ſide, when the Matter in Iſſue in it ſelf, and taken as a naked Propoſition, is of ſuch a Nature, as no Action, Indictment, or Information will lie for it ſingly, but it is *work'd up* by ſpecial Aggravations into Matter of *Damage* or *Crime*; as that it was done to *ſcandalize the Government*, to *riſe ſedition*, to *affront Authority*, or the like, or with ſuch or ſuch an *evil intent*. If theſe Aggravations, or ſome *overt Act* to manifeſt ſuch ill Deſign or Intention be not made

out

out by Evidence, then ought the Jury to find the Party Not Guilty; for example.

Bishop *Latimer*; (afterwards a Martyr in bloody Queen *Maries* days, for the Protestant Religion) in a Sermon preached before the most excellent King *Edward* the sixth delivered these words: 'I must desire your Grace to hear Poor Mens

'Suits your self; the Saying is now, That Money is heardle-

'very where; if he be Rich, he shall soon have an end of his

'Matter, others are fain to go home with weeping Tears for

'any help they can obtain at any Judges Hand. Hear Mens

'Suits your self, I require you in Gods behalf, and put them

'not to the Hearing of these Velvet-Coats, these Upskips.

'Amongst all others, one especially moved at this time to speak;

'This it is, Sir! A Gentlewoman came and told me, that a

'Great Man keepeth certain Lands of hers from her, and will

'be her Tenant in spite of her Teeth. And that in a whole

'Twelve-month she could not get but one day for the Hearing

'of her Matter, and the same day, when it should be heard,

'the Great Man brought on his side a great sight of Lawyers

'for his Counsel, the Gentlewoman had but one Man of Law,

'and the Great Man shakes him so, that he cannot tell what to

'do; so that when the Matter came to the Point, the Judge

'was at means to the Gentlewoman, that she should let the

'Great Man have a quietness in her Land: I beseech your

'Grace, that ye would look to these Matters. And you proud

'Judges! Harken what God saith in his Holy Book; *Audite*

'*illos ita parvum ut magnum*, Hear them (saith he) the

'Small as well as the Great, the Poor as well as the Rich,

'regard no Person, fear no Man. And why? *Quia Domini*

'*Judicium est*. The Judgment is Gods. Mark this Saying,

'thou Proud Judge, The Devil will bring this Sentence

'against thee at the Day of Doom. Hell will be full of these

'Judges, if they repent not, and amend, they are worse than

'the wicked Judge that Christ speaketh of *Luke* the 19th; that

'neither feared God nor the World. Our Judges are worse

'than this Judge was; for they will neither hear Men for God's

See *Latimers*
Sermons fo.
41. the se-
cond Sermon
before King
Edward the
sixth.

Prison.

‘ sake, nor fear of the World, nor Importunateness, nor any
 ‘ thing else; yea some of them will command them to * ward
 ‘ if they be importunate. I heard say, That when a Suiter
 ‘ came to one of them, he said, What fellow is it that giveth
 ‘ these folks counsel to be so importunate? he deserves to be
 ‘ Punished and Committed to ward. Marry sir / punish me then,
 ‘ It is even I that gave them Counsel, I would gladly be punish-
 ‘ ed in such a Cause, and if you amend not, I will cause them to
 ‘ cry out upon you still, even as long as I live. — These are
 ‘ the very words of that good Bishop and Martyr Father
 ‘ Latimer.

Jurym. Truly they are somewhat *Bold*, but I think very
Honest ones. But what signify they to our discourse?

Barr. Only this, suppose the Judges of those times, think-
 ing themselves agrieved by such his *Freedom*, should have
 brought an *Indictment* against him, setting forth, *that falsly*
and maliciously intending to scandalize the Government and
the Administration of Justice in this Realm, and to bring the
same into Contempt, he did speak, publish and declare the false
and scandalous words before recited.

Jurym. I conceive the Judges had more *Wis* than to trouble
 themselves about such a Business.

Barr. That’s nothing to the purpose, but suppose I say by
 them or any body else, it had been *done*, and his *speaking*
 the words had been *proved*, and you had then been Living
 and one of the Jury.

Jurym. I would have pronounced him *not Guilty*, and been
starv’d to Death before I would have consented to a contrary
 Verdict, Because the words in themselves are not *Criminal*, nor
 reflecting upon any particulars, and as for what is supposed to be
 laid in the Indictment or Information, that they were published
 or spoken to *scandalize the Government and the Administration*
of Justice, or to bring the same into Contempt, nothing of that
 appears.

Barr. You resolve as every *Honest, Understanding, Consci-*
entious man would do in the like Case, for when a man is *Pro-*
secuted

secuted for that which in it self is *no Crime*, how dreadfully soever it may be set out, as the Inquisitors in *Spain* use to Cloath Innocent Protestants, whom they Censure to the flames, with *Sambenito's* (Garments all over bepainted with *Devils*) that the people beholding them in so Hellish a drefs, may be so far from pitying them, that they may rather Condemn them in their thoughts as *Miscreants* not worthy to Live, though in truth they know nothing of their Cause, yet I say notwithstanding any such *Bugg-bear Artifice*, an Innocent man ought to be Acquitted, and not he and all his Family ruined and perhaps utterly undone, for *words* or *matters* harmless in themselves, and possibly very well intended, but only rendred *Criminal* by being thus hideously drest up, and wrestled with some far-fetch'd, forced and odious Construction.

Jurym. This is a matter well worthy the Consideration of all Juries, for indeed I have often wondred to observe the *Adverbs* in Declarations, Indictments and Informations in some Cases to be harmless *Vinegar and Pepper*, and in others *Hem-bane steep'd in Aqua fortis*.

Barr. That may easily happen, where the Jury does not distinguish Legal Implications, from such as Constitute, or materially *Aggravate* the Crime, for if the Jury shall honestly refuse to find the *latter* in Cases where there is not direct proof of them, *viz.* That such an Act was done *Falsly, Scandalously, Maliciously*, with an intent to *raise Sedition, defame the Government*, or the like, their mouths are not to be stoppt, nor their Consciences satisfied with the Courts telling them — *you have nothing to do with that, its only matter of Form or matter of Law, you are only to examine the Fact, whether he spoke such words, writ or sold such a Book or the like;* For, now if they should ignorantly take this for an Answer and bring in the Prisoner *Guilty*, though they mean and intend of the *naked Fact* or bare Act only, yet the Clerk Recording it, demands a further Confirmation, saying to them, thus, *well then you say A. B. is Guilty of the Trespass or Misdemeanour in manner and form as he stands Indicted and so you say all, to which the Foreman*

Foreman Answers for himself and his fellows *Yes*. Whereupon the Verdict is drawn up—*Juratores super Sacramentum suum dicunt, &c.* The Jurors do say upon their Oaths, that A. B. maliciously, in Contempt of the King and the Government, with an intent to scandalize the Administration of Justice, and to bring the same into Contempt, or to raise Sedition &c. (As the words before were laid) spake such Words, publishd such a Book, or did such an Act, against the Peace of our Lord the King his Crown and Dignity.

Disse. Thus a Verdict, so called in Law, *quasi veritatis*, because it ought to be the Choice or Saying of Truth it self, may become composd in its material part of Falshood. Thus Twelve men ignorantly drop into a Perjury. And will not every conscientious man tremble to pawn his Soul under the sacred and dreadful Solemnity of an Oath, to attest and justify a Lie upon Record to all Posterity; besides the wrong done to the Prisoner, who thereby perhaps comes to be hang'd (and so the Jury in foro conscientie are certainly guilty of his Murder) or at least by Fine or Imprisonment) undone with all his Family, whose just Curser will fall heavy on such unjust Jurymen and all their Posterity, that against their Oaths and Duty occasion'd their causeless misery. And is all this think you nothing but a matter of Formality?

Jurym. Yes really, a matter of Vast Importance and sad Consideration; yet I think you charge the mischiefs done by such Proceedings a little too heavy upon the Jurors; Alas good men! They mean no harm, they do but follow the directions of the Court, if any body ever happen to be to blame in such Cases it must be the Judges.

Barr. Yes, forsooth! That's the Jury-mens common-plea; but do you think it will hold good in the Court of Heaven? 'Tis not enough that we mean no harm, but we must do none neither, especially in things of that moment, nor will Ignorance excuse, where 'tis assu'd, and where duty obliges us to Inform our selves better, and where the matter is so plain and easie to be understood.

As for the *Judges* they have a fairer plea than you, and may quickly return the *Burthen* back upon the *Jurors*; for we, may they say, did nothing but our duty according to usual *Practice*, the *Jury* his Peers had found the Fellow Guilty upon their Oaths of such an *Odious Crime*, and attended with such vile, *presumptions*, and dangerous *Circumstances*. They are *Judges*, we took him as they presented him to us, and according to our duty pronounced the Sentence, that the Law inflicts in such Cases, or set a *Fine*, or ordered *Corporal punishment* upon him, which was very moderate, Considering the Crime laid in the *Indictment* or *Information*, and of which they had so sworn him Guilty; if he were innocent or not so bad as Represented, let his *Destruction* lye upon the *Jury* &c. At this rate if ever we should have an *unconscionable Judge*, might he Argue; And thus the Guilt of the *Blood* or ruin of an Innocent man when tis too late shall be *Bandied* to and fro, and *shuffled off* from the *Jury* to the *Judge*, and from the *Judge* to the *Jury*, but really *sticks fast* to both, but especially on the *Jurors*; because the very end of their Institution was to prevent all dangers of such oppression, and in every such Case, they do not only wrong their *own Souls*, and irreparably *Injure* a particular Person, but also basely betray the *Liberties* of their Countrey in General, for as without their *ill-compliance* and Act no such mischief can happen; so by it, ill precedents are made, and the *Plague* is encreased, *honester Juries* are *disheartned* or seduc'd by *Custom* from their Duties, just *Priviledges* are lost by *disuser*, and perhaps within a while some of themselves may have an *hole pickt* in their Coats, and then they are *Tryed* by another *Jury* just as wise and honest, and so deservedly come to smart under the *Ruinating Effects* and *Example* of their own Folly and Injustice.

Jurym. You talk of *Folly*, and blame *Jury-men*, when indeed they cannot help it, they would sometimes find such a Person *Guilty*, and such an one *Innocent*, and are perswaded they ought so to do, but the Court over-rules, and forces them, to do otherwise.

Barr. How I pray ?

Jury. How ? Why, did you never hear a Jury *threatned* to be *Fined and Imprisoned*, if they did not comply with the Sentiments of the Court ?

Barr. I have *Read* of such doings, but I never heard, or saw it done, and indeed I do not doubt but our *Seats* of Justice are furnisht with both *better men*, and *better Lawyers*, than to use any such *Menaces* or *Duress*, for undoubtedly 'tis a base and very *Illegal* Practise. But however will any man that *fears God*, say that is but an *honest* Heathen debauch his *Conscience*, and forswear himself, do his Neighbour *Injustice*, betray his Countreys Liberties, and consequently *enslave* himself, and his Posterity, and all this meerly because he is *Hector'd* and threaten'd a little ?

Jury. I know it should not sway with any, but alas, a *Prison* is terrible to most men, whatever the *Cause* be ; And the *Fine* may be such, if one shall refuse to comply, as may utterly *ruin* ones Family.

Jurors cannot be Fined or Imprisoned in any case for giving their Verdict according to their Consciences, though contrary to the direction or sense of the Court,

Barr. Fright not your self, there is no cause for this *Ague-fit*, to shake your Conscience out of Frame ; if you are *Threatned* tis but *Brutum Fulmen*, Lightning without a Thunderbolt, nothing but *big words*, for it is well known *That there is never a Judge in England that can Fine or Imprison any Jury-man in such a Case.*

Jury. Good Sir ! I am half asham'd to hear a *Barrister* talk thus ; have not some in our memory been *Fin'd* and *Imprison'd* ? And sure that which has *actually* been done is not altogether *Impossible*.

Barr. Your Servant Sir ! Under favour of your mighty Wisdom and Experience, when I said no Judge *could do it*, I spake the more like a *Barrister*, for tis a Maxim in Law — *Id possumus quod Jure possumus*. A man is said to be *Able* to do only so much, as he may *Lawfully* do. But such *Fining* or *Imprisoning* cannot *Lawfully* be done ; the Judges have no *Right or Power* by Law to do it, and therefore it may well be said, they *cannot*, or are *not able* to do it.

And

And whereas you say, that some *Juries in our Memory* have been Fined and imprisoned; you may possibly say true, But tis as true that it hath been only in our Memory, for no such thing was practised in Antient times, for so I find it asserted by a late Learned Judge (A) in these positive words; No *Lord Chief Justice Vaughan in his Reports fol. 146.* Case can be offered, either before Assaunts granted in General or after, that ever a Jury was punished by Fine and Imprisonment by any Judge, for not finding according to their evidence and his direction, until Pophams time, nor is there clear proof, that he ever Fined them for that Reason, separated from other Misdemourors. And Col, 152 he Affirms—That no man can shew, that a Jury was ever punished upon an Information either at Law or in the Star-Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like were joyn'd. So that you see, the Attempt is an Innovation as well as unjust, a thing unknown to our Fore-fathers and the Antient Sages of the Law; and therefore so much the more to be watcht against, resisted and suppressed, whilst young, lest in time this crafty *Cockatrice Egg* hatcht and fosterd by Ignorance, and pusillanimous Complacence, grow up into a *Serpent* too big to be mastered, and so Black and destroy the *First-Born* of our English Freedom. And indeed (Blessed be God) it hath hitherto been rigorously opposed as often as it durst Crawl abroad, being Condemned in Parliament and knockt o'th head by the Resolutions of the Judges upon solemn Argument. As by and by I shall demonstrate.

Juryin. Well; but are Jurors not liable then, o' Five or Imprisonment in any Case whatsoever.

Ans. Now you run from the Point we were talking of giving their Verdict, and you speak of any Case whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the words of that Learned Judge last Cited (C) Much of the Office of Jurymen binds to their Verdict & Ministeriall as not withdrawing from their Fellows after they are sworn, not receiving from either side Evidence

Juries Office partly Ministeriall, partly Judiciall. Vaughan Rep. fol. 152.

not given in Court; Not eating and drinking before their Verdict; Refusing to give a Verdict, &c. Wherein if they Transgress they may be finable. But the Verdict it self, when given, is not an *Act Ministerial*, but *Judicial* and (supposed to be) according to the best of their Judgment, for which they are not Finable, nor to be punish'd but by *Attaint*; that is, by another Jury, in Cases where an Attaint lies, and where it shall be found that *wilfully* they gave a Verdict false and Corrupt.

Now that Juries otherwise, are in no Case punishable; nor can (for giving their Verdict according to their Consciences and the best of their Judgment) be Legally Fined or Imprisoned by any Judge on Colour of *not going according to their Evidence*, or finding contrary to the directions of the Court, is a truth both founded on unanswerable Reasons and Confirmed by Irrefragable Authorities.

Jurym. Those I would gladly hear.

Barr. They are many, but some of the most evident are these that follow.

As for Reasons.

1. A Jury ought not to be Fined or Imprisoned, because they do not follow the Judges directions, for if they do follow his direction, they may yet be Attainted, and to say they gave their Verdict according to his directions is no Barr, but the Judgment shall be *revers'd* and they punish'd for doing that, which if they had not done, they should (by this Opinion) have been Fined and Imprisoned by the Judge, for not doing it. — Which is *Unreasonable*.

2. If they do *not follow* his direction, and be therefore Fined, yet they may be Attainted, and so they should be doubly punish'd by distinct Judicatures for the same Offence, which the Common Law never admits.

3. To what end is the Jury to be return'd out of the *Vicinage* (that is, the neighbourhood) whence the Issue ariseth? To what end must *Hundredors* be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the Vicinage in general? To what end are they *challeng'd* so scrup-

scrupulously to the *Array and Pale*? to what end must they have such a certain *Freehold*, and be *Probr. & legales homines*, and not of *Affinity* with the Parties concerned? &c. If after all this they *implicitly* must give a Verdict by the Dictates and Authority of another Man, under pain of *Fines* and *Imprisonment*, when sworn to do it according to the best of their *own knowledge*; a Man cannot see by anothers Eye, nor hear by *another's Ear*, no more can a Man conclude or *infer* the thing to be resolved by *another's* understanding or reasoning, unless all Mens understandings were equally alike; and if meerly in compliance because the Judge *says thus or thus*, a Jury shall give a Verdict, though such their Verdict should happen to be *right, true*, and just, yet they being not assured *it is so* from their own understanding, are *forsworn*, at least in *Fore Conscientia*.

4. Were Jurors so finable, then every Major and Bailiff of Corporations, all Stewards of Leets, Justices of Peace, &c. whatever Masters are try'd before them, shall have *Verdicts* to *their minds*, or else Fine and Imprison the Jurors till they *have*; so that such must be either pleased, honored, or gratified, else no Justice or Right to be had in any Court.

5. Whereas a Person by Law may *challenge* the Sheriff or any Jury-man, if of kin to his Adversary, yet he cannot challenge a Major, Recorder, Justice, &c. who 'tis possible will have a Verdict for their *Kinsman*, or against their *Enemy*, or else Fine and Imprison the Jury till they have obtained it; so that by this means our Lives, Liberties, and Properties shall be solely tried by, and remain at the Arbitrary dispose of every mercenary or corrupted *Justice*, Major, Bailiff, or Recorder, if any such should at any time get into *Office*.

6. 'Tis unreasonable that a Jury should be Finable on pretence of their going *against their Evidence*, because it can never be *Tried* whether or no in truth they did find with or against their Evidence, by reason no *Writ of Error* lies in the Case.

7. Were Jury-men liable to such Arbitrary Fines, they should be in a *worse condition* than the Criminals that are tried

by them; for in all Civil Actions, Informations, and Indictments, some Appeals, or Writs of false Judgment, or of Error, do lie into *superior Courts* to try the regular Proceedings of the Inferior. But here can be no After-Tryal or Examination, but the Jury must (if fining at all were *lawful*) must either pay the Fine, or lie by it, *without remedy*, to decide whether in his particular Case he were legally Fined or not.

8. Without a Fact agreed, it is as impossible for a Judge or any other to *know the Law* relating to that Fact; or *direct* concerning it, as to know an Accident that hath no Subject; for as where there is no Law, there is no Transgression, so where there is no Transgression, there is no place for Law; for the Law (with Divine Authority) is made for the Transgressor. And as *Cock* tells us, *Ex facta Jure oritur*, upon stating the Fact or Transgression matter of Law doth arise, or grow out of the Root of the Fact. Now the Jury being the *sole Judges of Fact*, and *Matter in Issue* before them, not finding the Fact on which the Law should arise, cannot be said to find against Law, which is no other than a Superstructure on Fact; so that to say they have found against the Law, when no Fact is found, is absurd; an expression insignificant and unintelligible; for no *Issue* can be joyned of matter in Law, no Jury can be charged with the Tryal of matter in Law hardly, no Evidence ever was, or can be given to a Jury of what is Law, or non. Nor can any such Oath be given to, or taken by a Jury to try matter in Law, nor does an Attaint for such Oath, if false, &c. But if by *finding against the Direction of the Court in matter of Law*, shall be understood, that if the Judge having heard the Evidence given in Court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this Evidence, *the Law is for the Plaintiff, or the Defendant*, and the Jury are under pain of Fine and Imprisonment to find accordingly, then to plain the Jury ought of Duty to do so. Now if this were true, who sees not that the Jury is but a *trouble some Dray*, of great Charge, much Formality, and no real use in determining right and wrong, but meer *Edches* to found back the pleasure of the

Court; and consequently that Tryals by them might be better *abolish'd* than continued? which is at once to spit Folly in the Faces of our Venerable Ancestors, and enslave our Posterity.

9. As the Judge can never direct what the Law is in any Matter Controverted, without first knowing the Fact, so he cannot possibly know the Fact but from the Evidence which the Jury have; but he can never fully know what Evidence they have, for besides what is sworn in Court, (which is all that the Judge can know) the Jury being of the Neighbourhood, may, and oft-times do know something of their own knowledge, as to the Matter it self, the Credit of the Evidence, &c. which may justly sway them in delivering their Verdict, and which self knowledge of theirs is so far countenanced by Law, that it supposes them capable thereby to try the Matter in Issue, (and so they must) though no Evidence were given on either side in Court. As when any Man is Indicted, and no Evidence comes against him, the Direction of the Court always is, *You are to acquit him, unless of your own knowledge you know him Guilty*; so that even in that Case they may find him Guilty without any Witnesses. Now, how absurd is it to think, that any Judge has power to Fine a Jury for going against their Evidence, when he that so Fineth knoweth perhaps nothing of their Evidence at all, (as in the last Case) or at least but some part of it? For how is it possible he should lawfully punish them for that which it is impossible for him to know.

Lastly, Is any thing more common, than for two Lawyers or Judges to deduce contrary and opposite Conclusions out of the same Case in Law? And why then may not two Men infer distinct Conclusions from the same Testimony? And consequently may not the Judge and Jury honestly differ in their Opinion or Result from the Evidence, as well as two Judges may, which often happens; and shall the Jury-men merely for this difference of Apprehension merit Fine and Imprisonment, because they do that which they cannot otherwise do, preserving their Oath and Integrity? especially when by Law they are presum'd to know better and much more of the Business, than the Judge does as aforesaid.

Are

Are not all these gross contradicting Absurdities? and unworthy (by any Man that deserves a *Gown*) to be put upon the *Law of England*, which has ever own'd *Right Reason* for its Parent, and dutifully submitted to be *guided* thereby?

Jurym. If the *Law*, as you say, be *Reason*, then undoubtedly this Practice of *Fining of Juries* is most *Illegal*, since there cannot be any thing more *unreasonable*; But what *Authorities* have you against it?

Barr. You have heard it proved to be a *Modern* up-start encroachment, so you cannot expect any direct or express Condemnation of it in Ancient Times, because the thing was not then *set on Foot*. And by the way, though *Negative Arguments* are not necessarily conclusive, yet that we meet with no *Precedents* of old of Juries Fined, for giving their Verdict contrary to Evidence, or the Sense of the Court, is a violent presumption, that it ought not to be done; for it cannot be supposed, that this latter Age did *first of all discover*, that Verdicts were many times not according to the Judges Opinion and *Liking*. Undoubtedly they saw *that* as well as we; but knowing the same not to be any Crime, or *punishable* by Law, were so *Modest* and *Honest* as not to meddle with it. However, what entertainment it hath met with when attempted in *our Times*, I shall shew you in two remarkable Cases.

1. When the late Lord Chief Justice *Keeling* had attempted something of that kind, it was complained of, and highly resented by the then *Parliament*; as appears by this Copy of their *Proceedings* thereupon taken out of their *Journal*, as follows.

Die Mercurii 11. Decembris 1657.

‘ The House resumed the Hearing of the rest of the Report touching the matter of *Restraint upon Juries*, and *that* upon the Examination of divers Witnesses in several Cases of *Restraints* put upon Juries by the Lord Chief Justice *Keeling*, and thereupon Resolved as followeth.

‘ First, That the Proceedings of the said Lord Chief Justice in the Cases now Reported are *Innovations* in the Tryal of Men for their Lives and Liberties. And that he hath used

• an *Arbitrary* and *Illegal* Power, which is of *dangerous* Consequence to the Lives and Liberties of the People of *England*,
 • and tends to the introducing of an *Arbitrary* Government.

• Secondly, That in the Place of Judicature the Lord Chief Justice hath undervalued, vilified, & contemned *Magna Charta*, the great *Preserver* of our Lives, Freedom, and Property.

• Thirdly, That he be brought to *Trial* in order to condign *Punishment*, in such manner as the House shall judge most fit and requisite.

Die Veneris 13. Decembris 1667.

• Resolved, &c.

• That the Precedents and Practice of *Fining* or *Imprisoning* of Juror, for giving their *Verdicts*, is *Illegal*.

Here you see it *Branded* in *Parliament*: Next you shall see it formally condemn'd on a solemn Argument by the *Judges*. The Case thus.

At the Sessions for *London* Sept. 1670 *William Pen*, and *William Mead* (two of the People commonly called *Quakers*) were Indicted, for that they with others, to the number of 300, on the 14th. Aug. 22. Regis, in *Gray Church-street*, did with Force and Arms, &c. unlawfully and tumultuously assemble and congregate themselves together to the disturbance of the Peace; and that the said *William Pen* did there Preach and speak to the said *Mead* and other Persons in the open Street; by reason whereof a great Concourse and Tumult of People in the Street aforesaid then and there a long time did remain and continue, in contempt of our said Lord the King, and of His Law, to the great disturbance of his Peace, to the great Terror and disturbance of many of His Liege People and Subjects, to the ill example of all others in the like Case Offenders, and against the Peace of our said Lord the King, His Crown and Dignity.

The Prisoners Pleading *Not Guilty*, it was proved, that there was a Meeting at the time in the Indictment mentioned, in *Gray Church-street*, consisting of three or four hundred People, in the open Street, that *William Pen* was *Speaking* or *Preaching*

The Sum of
 the Case of
Pen and *Mead*
 and the
 rest of Mr.
Pen and Mr.
Meads Jury.

Note, the Quakers have a Meeting-house in that Street, out of which they were then kept by Soldiers, and therefore they met as near to it as they could in the open Street.

to them, but ~~what~~ he said the Witnesses (who were Officers and Soldiers sent to disperse them) could not bear. — This was the effect of the Evidences; which Sir John Howell, the then Recorder, (as I find in the *Print* of that Tryal p. 14) was pleas'd to sum up to the Jury, in these words.

You have heard what the Indictment is, 'tis for Preaching to the People in the Street, and drawing a Tumultuous Company after them, and Mr. Pen was speaking; if they should not be disturb'd, you see they will go on, there are three or four Witnesses that have proved this, that he did Preach there, that Mr. Mead did allow of it. After this you have heard by substantial Witnesses what is said against them. Now we are upon the Matter of Fact, which you are to keep to, and observe, as what hath been fully sworn, at your peril.

This Tryal began on the Saturday; the Jury retiring, after some considerable time spent in debate, came in, and gave this Verdict, — *Guilty of speaking or Preaching in Gray Church Street.* At which the Court was offended, and told them, *they had no good sayings;* Adding, — *Was it not an unlawful Assembly? you own he was speaking to a Tumult of People there.* But the Foreman giving, what he had deliver'd was all he had in Commission, and others of them affirming, That they allow'd of no such words as an *unlawful Assembly* in their Verdict, They were sent back again; and then brought in a Verdict in writing, subscribed with all their Hands, in these words.

We the Jurors hereafter named do find William Pen to be Guilty of speaking or Preaching to an Assembly not together in Gray Church Street the 14th of Aug. 1670. And William Mead not Guilty of the said Indictment.

Thus the Court relented still worse, and therefore sent them back again; and Adjourn'd till Sunday morning, but when too they insist'd on the same Verdict, so the Court Adjourn'd till Monday morning; and then the Jury brought in the Prisoners generally *Not Guilty*, which was Recorded, and allow'd of. But immediately the Court fined them Forty Mark a Man, and to lie in Prison till paid.

*Note, though this Jury for their excellent example of courage and constancy deserve the commendation of every good English-man, yet if they had been better advis'd, they might have brought the Prisoners in *Not Guilty* at first, saved themselves the trouble and inconveniences of these two Nights Restraint.

Being

Being thus in *Custody*, *Edw. Bushel*, one of the said Jurors, on the 9th of Nov. following brought his *Habeas Corpus* in the Court of *Common-Pleas*. On which the Sheriffs of *London* made Return, ' That he was detained by vertue of an Order ' of Sessions, whereby a Fine of forty Marks was set upon him ' and eleven others particularly named, and every of them be- ' ing Jurors sworn to try the Issues joyned between the King, ' and *Pen*, and *Atread*, for certain Trespasses, Contempts, unlaw- ' ful Assemblies and Tumults, and who then and there did ac- ' quit the said *Pen* and *Atread* of the same, against the Law of ' this Kingdom, and against full and manifest Evidence, and a- ' gainst the direction of the Court in matter of Law of and upon ' the Premises openly in Court to them given and declared; and ' that it was ordered they should be imprisoned till they several- ' ly paid the said Fine, which the said *Bushel* not having done, ' the same was the cause of his Caption and Detention.

See *Bushel's* Case in *Vaughans Reports* at large.

The Court coming to debate the validity of this Return, adjudged them same *insufficient*; for 1. The Words, — *Against full and manifest Evidence*, was too general a Cause; the Evidence should have been *fully* and particularly recited, else how shall the Court know it was *so full and evident*; they have now only the Judgment of the *Sessions* for it, that it was so; but, said the Judges, *Our Judgments ought to be Grounded upon our own Inferences and Understandings, and not upon theirs.*

2. It is not said, that they acquitted the Persons Indicted against full and manifest Evidence, *corruptly, and knowing the said Evidence to be full and manifest*, for otherwise it can be no Crime; for that may seem *full and manifest* to the Court, which does not appear so to the Jury.

3. The other part of the Return, *viz.* That the Jury had acquitted those Indicted, *against the direction of the Court in matter of Law*, was also adjudged to be *naught*, and unreasonable, and the *Fining of the Jurors for giving their Verdict in any Case* concluded to be illegal, for the several Reasons before re- cited, and other Authorities of Law urged to that purpose; and all the Precedents and Allegations brought to justify the

Fine and Commitment solidly answered; whereupon the Chief Justice delivered the *Opinion of the Court*, That the Cause of Commitment was *insufficient*; and accordingly the said *Bushel*, and other his Fellow-prisoners, were *discharged*, and left to the Common Law for *Remedy and Reparation of the Damages* by that tortious *illegal* Imprisonment sustained.

Which Case is (amongst others) Reported by that Learned Judge Sir *John Vaughan*, at that time Lord Chief Justice of the *Common-Pleas*, setting forth all the Arguments, Reasons, & Authorities on which the Court proceeded therein; from which I have extracted most of the *Reasons* which before I recited for this Point, & for the greatest part in the *very words* of that Reverend Author.

Jurym. This *Resolution* hath, one would think (as you said) *knock'd this* Illegal Practice on the Head, beyond any possibility of *Revival*, but may it not one day be *denied* to be Law, and the contrary *justified*?

Barr. No such thing can be done without apparent *violating* and subverting all *Law, Justice, and Modesty*; for though the *Precedent* it self be valuable, and without further inquiry is wont to be allowed; when given thus *deliberately* upon solemn debate by the whole Court; yet 'tis not only *that*, but the sound substantial and everlasting *Reasons*, whereon they grounded such their Resolves, that will at all times *Justify* Fining of Juries in such Cases to be *Illegal*; besides, as the *Reporter* was most considerable, both in his *Quality* as Lord Chief Justice, and for his Parts, soundness of Judgment, and deep Learning in the *Law*; so such his Book of Reports is *approved* and recommended to the World, (as appears by the Page next after the Epistle) by the Right Honourable the present Lord Chancellor of *England*; Sir *William Scroggs*, now Lord Chief Justice of *England*, my Lord *North*, Chief Justice of the *Common-Pleas*; and in a word, by all the Judges of *England* at the time of Publishing thereof; so that it cannot be imagined how any Book can challenge greater Authority, unless we should expect it to be particularly confirm'd by Act of Parliament.

Jurym. You have answered all my *Scruples*, and since I see the

the Law has made so good *Provision* for Jury-mens priviledges and safety, God forbid any Jury-man should be of so *base* a temper, as to betray that (otherwise) impregnable *Fortress* wherein the Law hath plac'd him, to preserve and defend the just Rights and Liberties of his Country, by treacherously surrendering the same into the hands of *Violence* or *Oppression*, though maskt under never so fair Stratagems and Pretences; for my own part, I shall not now decline to appear according to my Summons, and therefore (though I fear I have detained you *too long* already) shall desire a little more of your direction about the *Office* of a Jury-man, in particular that I may uprightly and *honestly* discharge the same.

Barrist. Though I think from what we have discours'd being *digested* and improv'd by your own Reason, you may sufficiently Inform your self, yet to gratifie your request, I shall add a few brief *Remarques*, as well of what you ought cautiously to *avoid*, as what you must diligently *pursue* and regard if you would justly and truly do your duty.

First, as to what you must avoid.

1. I am very Confident, that you would not willingly violate *the Oath* which you take, but 'tis possible that *there are* such who as frequently *break* them, as *take* them, through their *careless custome* on the one hand, or *slavish fear* on the other, against which I would fully caution you; that you may defend your self and others, against any Enemies of your Countreys Liberties and happiness, and keep a good Conscience towards God and towards man.

2, 'Tis frequent, that when Juries are withdrawn that they may consult of their *Verdict*, they soon forget that Solemn Oath they took, and that *mighty Charge* of the Life and Liberty of men, and their Estates, whereof then they are made *Judges*, and on *their Breath* not only the *Fortunes* of the particular Party, but perhaps the preservation or *Ruin* of several Numerous Families does Solely depend, now I say without due Consideration of all this, nay sometimes without *one serious thought*, or Consulted Reason offered *Pro*, or *Con*, presently the *Fore-*

man or one or two that call themselves *Antient* Jury-men (though in truth they never *know* what belongs to the place more than a common *School-Boy*) rashly deliver their *Opinions*, and *all the rest* in respect to their supposed *Gravity* and *Experience*, or because they have the biggest *Estates*, or to avoid the trouble of *disputing* the Point, or to prevent the spoiling of *Dinner* by delay, or some such *weighty* Reason, forthwith agree *blind fold*, or else go to holding up of hands or telling of *Noses*, and so the *Major Vote* carries away *Captive* both the *Reason* and the *Consciences* of the rest. Thus trifling with *Sacred Oaths*, and putting mens *Lives*, *Liberties* and *Properties* (as it were) to the hap-hazard of *Cross* or *Piles*. This Practice or something of the like kind, is said to be *too Customary* amongst some Jurors, which occasions such their extraordinary *dispatch* of the weightiest or most *Intricate* matters, but there will come a time when they shall be called to a severe Account for their *Hast* and *Negligence*, therefore have a care of such *Fellow-Jurors*.

3. Such a *slavish* Fear attends many Jurors, that let the Court but direct to find *Guilty*, or *not Guilty*, though they themselves see no just Reason for it, yea oft-times though their own *Opinions* are contrary, and their *Consciences* tell them it ought to go *otherwise*; yet, right or wrong accordingly they will bring in their *Verdict*; and therefore many of them never regard seriously the *course* and force of the Evidence, what and how it was delivered more or less to prove the *Indictment*, &c. But as the Court *sums it up*, they find; as if *Juries* were appointed for no other purpose but to *Echo* back, what the Bench would have done; such a base temper is to be avoided, as you would escape being *Forsworn*, even though your *Verdict* should be right; for since you do not know it so to be by your own *Judgment* or *Understanding*, you have *abused your Oath* and hazarded your own *soul* as well as your Neighbours *Life* *Liberty* or *Property*, because you *blindly* depend on the opinion or perhaps *passion* of others, when you were *Sworn* well and truly to try them *your selves*. Such an
implicite

implicite Faith is near of Kin to that of *Rome* in Religion, and (at least in the next degree) as *dangerous*.

4. There are some that make a *Trade* of being Jury-men that *seek* for the Office, use means to be constantly *continued* in it, will not give a *disobliging* Verdict lest they should be *discharg'd* and serve no more, these *standing Jurors* have certainly some ill game to play, there are others that hope to *signalize* themselves to get a better Trade, or some *Preferment* by *serving a Turn*; there are others that have particular *Piques* and a humor of Revenge against such or such *Parties*, if a man be but *miscall'd* by some Odious name, or said to be of an exploded Faction — straight they cry *hang him*, *Find him Guilty*, no punishment can be too bad for such a *Fellow*, in such a case they think it merit to *Stretch* an Evidence on the tenter-hook, and *strain* a Point of Law because they fancy it makes for the Interest of the Government. As if *Injustice* or *Oppression* could in any case be for the true Interest of Government when in truth nothing more *weakens* or *destroys* it, but this was an *old stratagem*, if thou *suffer this man to escape*, thou shalt not be *Cæsar's Friend*. When Cæsar was so far from either *needing* or *thanking* them for any such base Services, that had he but truly understood them, he would severely have punished their *Partiality* and *Tyranny*.

All these and the like *pestilent Biases* are to be avoided and abominated by every honest Jury-man.

But now as to the positive Qualifications requisite.

1. You that are Jury men should first of all seriously regard the weight and importance of the Office; your own Souls other mens Lives, Liberties, Estates, all that in this World are dear to them, are at Stake, and in your hands; therefore consider things well before-hand, and come substantially furnished and provided with sound and well-grounded Consciences, with clear minds, free from malice, fear, hope, or favours; lest instead of *Judging* others, thou shouldest work thy own Condemnation, and stand in the sight of God our Creator and Judge of all men; no better than a *Murderer*, or *Perjur'd* Malefactor.

2. Ob-

2. Observe well the Record, Indictment or Information that is read, and the several parts thereof, both as to the matter, manner, and form.

3. Take due notice and regard to the Evidence offered for Proof of the Indictment, and each part of it, as well to manner and form as matter; and if you suspect any Subornation, foul Practise, or tampering hath been with the witnesses, or that they have any malice or sinister design, have a special regard to the Circumstances or Incoherencies of their Tales, and endeavour by apt Questions to sift out the truth, or discover the Villainy. And for your better satisfaction endeavour to write down the evidence or the Heads thereof that you may the better Recall it to memory.

4. Take notice of the nature of the Crime charged, and what Law the Prosecution is grounded upon, and distinguish the supposed Criminal Fact which is proved, from the aggravating Circumstances which are not proved.

5. Remember that in Juries there is no Plurality of Voices to be allowed; 7 cannot over-rule or by virtue of Majority Conclude 5. no, nor 11, 1. But as the Verdict is given in the name of all the 12, or else it is void : So every one of them must be actually agreeing, and satisfied in his particular Understanding and Conscience, of the truth and Righteousness of such Verdict, or else he is forsworn; and therefore if one man differ in Opinion from his fellows, they must be kept together, till either they by strength of Reason or Argument can satisfy him, or he convince them. For he is not to be Hecker'd, much less punish'd by the Court into a

Rep. fol. 151.

Compliance; for as the L. Ch. Justice *Vanghan* says well, *if a man differ in Judgment from his Fellows whereby they are kept a day and a night, though his dissent may not in truth be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no more Criminal than four or five disagreeing with the rest.* Upon which occasion the said Author recites a remarkable Case out of an antient Law-Book a Juror would not agree with his fellows
for

41 ff. p. 11.

for two days, and being demanded by the Judges, if he would agree, said, he would first die in Prison, whereupon he was Committed and the Verdict of the eleven taken, but upon better Advice, the Verdict of the eleven was Quash'd, and the Jury discharged without Fine, and the Justices said the way was to carry them in Carts (this is to be understood at Assizes where the Judges cannot stay but must remove in such a time into another County) until they agreed, and not by Fining them. And as the Judges err'd in taking the verdict of Eleven, so they did in Imprisoning the Twelve. And therefore you see on second thoughts Releas'd him.

6, Endeavour as much as your Circumstances will permit at your spare Hours to Read and Understand the Fundamental Laws of the Country; such as *Magna Charta*, the Petition of Right, the late excellent Act for *Habeas Corpus*'s, *Horn's* *Mirror of Justice*, Sir *Edw. Cook* in his 2^d 3^d and 4th parts of the *Institutes of the Law of England*, and Judge *Venables* Reports, these are Books frequent to be had, and of excellent use to inform any Reader of Competent Apprehension, of the true Liberties and Priviledges which every *English* man is Justly Intituled unto, and Estated in by his Birth-right, as also the nature of Crimes and the punishments severally and respectively Inflicted on them by Law, the Office and duties of Judges, Juries, and all Officers and Ministers of Justice, &c. Which are highly necessary for every Jury-man in some Competent measure to know, for the Law of *England* hath not placed Tryals by Juries to stand between men and Death or Destruction to so little purpose as to Pronounce men *Guilty*, without regard to the nature of the Offence, or to what is to be Inflicted thereupon.

For want of duly understanding and considering these things, Juries many times plunge themselves into lamentable perplexities; as it befel the Jury who were the Tryers of Mr. *Udal* a Minister, who in the 32^d year of *Q. Eliz.* was Indicted and Arraigned at *Croydon* in *Surry*, for High-Treason, for defaming the Queen and Her Government in a certain Book Intituled, *A Demonstrat[i]on of the Discipline*, &c. And though there was no Direct, but a scrambling Shadow of Proof, and though the Book duly considered contained no matter of Treason, but certain words which by a forced construction were laid to tend to the defamation of the Government, and so the thing prosecuted under that Name; yet the Jury not thinking that in pronouncing him Guilty, they had upon their Oath pronounced him Guilty of Treason, and to die as a Traitor; but supposing that they had only declared him *Guilty* of making the Book, hereupon they brought him in *Guilty*, but when after the Judges Sentence of Death against him (which they never in the least intended) they found what they had done, they were confounded in themselves, and would have done any thing

thing in the world to have Revok'd that unwary pernicious Verdict, when, alas! it was too late. Dr. Fuller has this witty note on this witty Gentlemans Conviction, that it was Conceived *rigorous* in the *greatest*, which at best (saith he) is *Cruel* in the *least* Degree. And it seems so Queen Elizabeth thought it, for she suspended Execution, and he dyed naturally. But his Story survives to warn all Succeeding Jury-men to endeavour better to understand what it is they do, and what the Consequences thereof will be.

7. As there is nothing I have said intended to encourage you to partiality, or tempt any Jury-man to a Connivance at Sin and Malefactors, whereby those Pests of Society should avoid being brought to condign punishment, and so the Law cease to be a terror to evil-doers; which were in him an horrible Perjury, and indeed a foolish Pity, or *Crudelis misericordia*, a Cruel Mercy; for he is highly injurious to the Good that absolves the Bad, when real Crimes are proved against them; so that I must take leave to say, That in Cases where the matter is dubious, both Lawyers and Divines prescribe rather favour than rigour; an eminent and learned Judge * of our own has in this Advice and Will gone before me, *Malem revera viginti Facinorosos mortem pietate evadere, quam justum unum injuste condemnari.* I verily (saith he) had rather twenty evil-doers should escape death through Tenderness or Pity, than that one Innocent Man should be unjustly condemned.

I shall conclude with that excellent Advice of my Lord Cook, * which he generally addresses to all Judges, but may no less properly be applied to Jurors. —

Fear not to do Right to all, and to deliver your [Verdicts] justly according to the Laws; for Fear is nothing but a betraying of the Succours that Reason should afford; and if you shall sincerely execute Justice, be assured of three Things,

1. Though some may malign you, yet God will give you his Blessing.
2. That though thereby you may offend Great Men and Favourites, yet you shall have the favourable Kindness of the Almighty, and be his Favourites.

And lastly, That in so doing, against all scandalous Complaints, and pragmatrical Devices against you, God will defend you as with a Shield.

— For thou Lord wilt give a Blessing unto the Righteous, and with thy favourable Kindness wilt thou defend him as with a Shield.

F I N I S.

* Fortescue,
Ca. 27.

* In the Epilogue of his
4th Part of
Institutes.

Psal. 5. 15.

